SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 375

WESTERN UNION DIVISION, THE COMMERCIAL TELEGRAPHERS' UNION, AMERICAN FEDERATION OF LABOR,

Appellant,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, THE WESTERN UNION TELEGRAPH COMPANY,

Appellees

BRIEF OF APPELLANT

IN OPPOSITION TO MOTION TO AFFIRM

In their joint Motion to Affirm the judgment of the District Court, appellees United States of America and Federal Communications Commission concede that:

> "the Commission may not suspend the operation of any laws without specific statutory authority, and it is recognized that Section 214 of the Communications Act of 1934, as amended, contains no authority to suspend the Federal anti-trust laws".

Appellees nevertheless contend that the *McLean* case (*McLean Trucking Company* v. *United States*, 321 U. S. 67), sustains the action of the Federal Communications Com-

mission taken here under Section 214 where, *unlike* Section 5(11) of the Interstate Commerce Act, and Sections 221(a) and 222(c)(1) of the Communications Act of 1934, as amended, no power is conferred upon the Federal Communications Commission to suspend the operation of the anti-trust laws. A careful reading of the *McLean* case demonstrates that this Court emphasized, to the contrary, that while the granting of the power to the Interstate Commerce Commission to suspend the operation of the anti-trust laws did not relieve that agency of the duty to exercise its discretionary power in the manner provided by statute, that in the *absence* of the statutory power the agency would have had no right even to consider whether to approve a proposal which would result in a lessening of competition. In such circumstances, said the Court speaking through Mr. Justice Rutledge, the transaction would have "run afoul of the anti-trust laws" (321 U. S. at 78).

The heart of appellees' case is found in the following statements in their Motion to Affirm:

> "The *McLean* case did hold, among other things, that the fact that a carrier participating in a properly authorized transaction may obtain immunity from prosecution under the anti-trust laws in no sense relieves the Commission of its duty, as an administrative matter, to consider the effect of the proposed transaction on the general competitive situation in the industry in the light of the objectives of the legislation which the agency has been commissioned to effectuate. A portion of the opinion of this court in the *McLean* case in this regard reads as follows:
>
> > " 'In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantage of improved service, safer operation, lower costs, etc., to determine whether the consolidation

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> will assist in effectuating the over-all transportation policy. . . .'
>
> "Thus it is clear that the anti-trust policy of the United States should be considered by the Commission as an element of the applicable statutory standard of 'public convenience and necessity' whether or not Section 214 contains anti-trust exemption authority. After considering the public policy expressed in the anti-trust laws to preserve to the public the benefits of competitive operations as one element among others of the statutory standard of 'public convenience and necessity', the Commission concluded that Western Union's application should be granted. The Commission's order in effect indicated that the Commission did not believe that the facts of the case warranted giving conclusive weight to the effects of a diminution in competition between telegraph and telephone services in the communities involved."

We quite agree that the Commission must consider the anti-trust policy of the United States, but we submit, further, that it may not, as asserted by appellees, consider this as "one of the elements", in determining whether or not to approve of the proposal without specific statutory authorization and requirement. Absent statutory authority under Section 214 to suspend the operation of the anti-trust laws, the Federal Communications Commission may not weigh the damage to the national anti-trust policy resulting from the suppression of competition under an arrangement where, to quote again from the majority opinion of the Federal Communications Commission:

> "the telegraph company will be turning over to a telephone company, a normal competitor, its operations in certain communities."

If, as asserted by the appellees, the Federal Communications Commission may, without specific Congressional au-

thority, weigh elimination of competition against possible benefits to the public, then we submit that there would be no necessity for statutes such as Section 5(11) of the Interstate Commerce Act and Sections 221(a) and 222(c)(1) of the Communications Act of 1934, as amended. This, we suggest, is the true meaning of the Court's opinion in the *McLean* case.

Apparently unable to explain away the decision of this Court in the *Columbia Steel* case (*United States* v. *Columbia Steel Company et al.*, 334 U. S. 495) appellees state merely that appellant is under a misconception as to the meaning of the decision of the Commission and the District Court. We believe it clear that the *Columbia Steel* case does stand for the proposition that an area less than nationwide in scope may be the subject of an anti-trust violation. Further, we stress that the arrangement here would eliminate competition in 100% of the area of the application filed by Western Union. It was *this* area which was before the District Court, not the entire United States.

That the District Court was comparing the area of the application with the nationwide telegraph business is shown by its statement that:

> "We do not have before us a major plan to adopt generally this same sort of agency substitution. If we did, we would have a different problem."

Under the reasoning of the District Court a "major plan" to do what is attempted here would raise a "different problem." We suggest that there is no different problem—the only difference is that we would then have elimination of competition on a *national* scale instead of in the six Ohio towns which were the subject of the present application.

We have pointed out in our Statement as to Jurisdiction that under the reasoning of the District Court a series of applications could be approved because each would involve

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a relatively small percentage of the national volume of telegraph business. If it appears, however, that we are approaching a "major plan" the succeeding applications become suspect. If the saturation point of legality is reached after a series of applications have been approved which eliminate competition in areas similar to the present one, perplexing problems arise. Does the District Court's opinion mean that all previous arrangements are retroactively illegal? May the employees of Western Union who have been discharged under the previously approved arrangements have the right to maintain actions for damages under the Sherman Act? Confessedly, we do not know the answers. But we stress that the very doubts raised demonstrate the unsoundness of the opinion of the District Court.

Appellees seek to convince the Court that telegraph service to the public will remain the same. We agree that the public will continue to receive telegraph service of a sort. But it will be telegraph service under the control of the presently competing telephone company. And we join with the dissenting Commissioners, Chairman Coy and Commissioner Durr, in their remarks that they "do not see how a company can effectively compete with itself".

We submit that the Judgment, Order and Decree of the District Court is erroneous, and urge that it be reversed.

Respectfully submitted,

FRANK BLOOM,
Attorney for Appellant,
918 Du Pont Circle Bldg.,
Washington 6, D. C.

October 12, 1949.